IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4906 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALUSHA NURSHA FAKIR

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR IM PANDYA AGP Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 15/04/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the

order passed against him by Police Commissioner, Surat City, on 27th of February, 2004, in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as dangerous person from 28th of February, 2004 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration four crimes registered against the petitioner for the offences punishable under Sections 379 and 114 of the Indian Penal Code, and secondly two in-camera statements, as recorded by the sponsoring authority on 6th of February and 7th of February, 2005, as verified by the detaining authority on 21st of February, 2005. The identity of the witnesses is not disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act.

3. Out of four crimes registered against the petitioner, first three were registered before Athwa Police Station, Surat, on 20th of October, 2004; 27th of November, 2004 and on 4th of December, 2004. In each of these three cases, it was alleged that the petitioner was involved in the theft of Hero Honda Splendor motorcycles. The fourth crime was registered before Kathargam Police Station on 12th of November, 2004, wherein also it was alleged that the petitioner was involved in theft of Hero Honda Splendor motorcycle. The detaining authority examined thoroughly and exhaustively the investigation papers in all the four cases and came to the conclusion that the petitioner was habitually committing offences of theft.

4. Out of two in-camera statements relied upon by the detaining authority, the first witness referred to an incident of 14th of November, 2004. On that day, in the evening, the witness was driving his passenger vehicle through the area of Salabatpura Police Station and parked the vehicle in search of the business. At about 5.00 p.m., the petitioner and his accomplices approached the witness, and the witness was told to take all the four accomplices in his vehicle at Limbayat Mithikhadi. The witness stated that only three persons can be accommodated and four persons cannot be accommodated in his vehicle. Thereupon, the petitioner was excited and dragged the witness out of the vehicle and started beating him in public place. The witness raised shouts for help, which attracted a crowd. Some persons from the crowd attempted to intervene, but at the instigation of

the petitioner, his accomplices rushed towards the crowd with sticks and people started running helter-skelter. The public order was disturbed. Shop owners closed their shops in the area and area was terror stricken. The second witness referred to an incident of 11th of December, 2004. The witness in the morning along with his passenger vehicle was waiting for passengers in the area of Limbayat. At about 9.00 a.m., the petitioner and his accomplices approached the witness and directed the witness to carry loose spare parts of a vehicle in his passenger vehicle to a garage. On refusal by the witness, the petitioner was excited and started beating the witness in public place. Shouts raised by the witness attracted a crowd but petitioner instigated his accomplices and all of them rushed towards the crowd with sticks and people started running helter skelter so as to disturb the public order. The area was terror stricken. The shop owners closed their shops and residents confined themselves in their houses.

6. From the above material, the detaining authority came to the conclusion that the petitioner was engaged in illegal activities of committing theft of two wheeler vehicles. The detaining authority also came to the conclusion that the petitioner was dangerous person within the meaning of PASA Act. The detaining authority also concluded that the petitioner was headstrong, ferocious and violent by temper and was keeping deadly weapon with him. It was also alleged that the petitioner was in habit of picking up quarrels with the citizens and to beat them to execute his dangerous activities and out of fear of the petitioner, none dared to file any complaint against him. The detaining authority concluded that the activities of the petitioner were prejudicial to the maintenance of public order and were required to be prevented forthwith. After considering other alternative remedies available against the petitioner under the general law, the detaining authority reached to the subjective satisfaction that there was no other alternative, except to detain the petitioner under the PASA Act as dangerous person to prevent his illegal activities forthwith. The detaining authority, therefore, passed an order of detention of the petitioner as aforesaid, which is under challenge in this petition.

7. Learned advocate Ms.S.G.Patel for the petitioner and learned AGP Mr I.M. Pandya for the respondents were heard at length. The affidavit-in-reply filed by the detaining authority as placed on record was also taken into consideration.

8. Out of various grounds urged on behalf of the petitioner to challenge the order of detention as opposed and controverted by the learned AGP, it appears that this petition can be examined and disposed of on the sole issue that whether there was credible and cogent materials placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed.

9. To reach to the subjective satisfaction that the dangerous activities of the petitioner were prejudicial to the maintenance of public order, the detaining authority must rely upon cogent and credible material indicating that the activities of the detenu directly or indirectly were causing or were likely to cause any harm, danger or widespread or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life property or the public health. While undertaking this exercise, the detaining authority must apply his mind about the difference between the cases falling in the category of "breach of law and order" and the cases falling in the category of "breach of public order."

10. True that as many as four cases came to be registered against the petitioner for theft of two wheeler vehicles. It was also alleged that in these cases, vehicles alleged to be stolen were recovered during investigation. The detaining authority took into consideration the investigation papers in all these four cases. Therefore, the prime issue for consideration is, the activities reveal through the investigating papers in all four cases can be branded to be activities disturbing the public order as noted above. Undoubtedly, these four cases came to be filed against the petitioner for theft of two wheeler vehicles. These cases are pending for disposal according to law. The activities disclose through the investigating papers in these four cases may be an offence being the activities against penal statute of country, but it could not at all be said that the activities of the petitioner reveal through the investigating papers formed an offence under the penal law are the activities disturbing the public order to the extent that widespread danger to life and property could be inferred. At the most filing of these cases being offences may be labelled as breach of law and order for which the petitioner is going to be tried and may be punished, if found guilty. But as aforesaid, the act constituting the offence cannot be said to have affected the even tempo of life of community, therefore, filing of the cases may be four in numbers against the petitioner,

have no bearing at all on the question of maintenance of public order.

11. The rest of the material, which relied upon by the detaining authority is in the form of two incamera statements. While any activity is to be judged within the scope, as to whether such activities disturbed the public order, it becomes the duty of the detaining authority to consider fall out, reach and impact of the activities, revealing through materials placed before him and then come to the conclusion that whether potentiality of the activities alleged was capable of disturbing the public order. On going through minutely and carefully and applying the above said principle of law, it clearly appears that two incidents narrated through incamera statements were more individual disputes than to involve the society at large or disturbing the even tempo of life of the community. Employing phrases by the witnesses like disruption of traffic and normal life and spreading of fear and terror, or employing such phrases by the detaining authority in the reasons, could not stretch the alleged activities to the extent of such activities disturbing the public order. While such activities are scanned through its fall out, reach and impact, it is dear that these are not the activities disturbing the public order. Therefore, the potentiality of the act alleged through incamera statements, even from the bare reading of them, do not disclose capability to disturb the even tempo of life of the community or society at large or section of the society. It is clear that from the said activity, neither widespread danger to the society nor dangerousness or harmfulness affecting the society could be inferred from such activities of the petitioner disclosing through incamera statements. Therefore, even after taking two incamera statements on there face value they are unable to convince that the activities disclosed by the statements were prejudicial to the maintenance of public order. At the most the acts disclosed through the statements, may be breach of law and order and could be taken care by the general law.

12. In the matter of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393, wherein after considering many decisions of the Apex Court, the Division Bench of this Court has observed in paragraphs No.20 and 21 as under.

> "20. The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and T. Devaki v. State of Tamil Nadu,

AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly, in T. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was high lighted. It was also alleged that people were scared and had run helter skelter. In spite of such allegations the Supreme Court held that they were not cases of maintenance of public order and hence, an action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again, in Mustakmiya Jabbarmiya Shaikh v. M.M.Mehta, Commissioner of Police and others, 1995 (2) GLR 1268 (SC), the Supreme Court considered the relevant decisions on point including the decision in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases."

13. The present set of facts are squarely covered by the above said decision of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki [supra]. In this view of the matter, the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner, cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

14. In the result, the petition is allowed. The order passed by the Police Commissioner, Surat City on 27th of February, 2005 against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu - Kalusha Nursha Fakir

is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

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